


construction to operation schedule. It is, however, practically impossible to go forward when the status of the permit and the business structure are subject to F.C.C. action.

This statement is true and correct to the best of my knowledge and belief and is made under penalty of perjury.



Joseph Rey, General Partner
Rainbow Broadcasting Company

Date: April 10, 1993

ATTACHMENT F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	
)	
RAINBOW BROADCASTING COMPANY)	File Nos. BMPCT-910125KE
)	BMPCT-910125KE
For Extension of Construction)	BTCCT-911129KT
Permit and For Consent to)	
Transfer of Control of Station)	
WRBW(TV), Orlando, Florida)	

To: Roy J. Stewart, Chief
Mass Media Bureau

RAINBOW RESPONSE TO SUPPLEMENT TO INFORMAL OBJECTIONS

Rainbow Broadcasting Company, permittee of Station WRBW, Channel 65, Orlando, Florida, hereby responds to an unauthorized pleading filed by Press Broadcasting Company on April 30, 1993 entitled "Supplement to Informal Objections".^{1/}

Press is the operator of independent UHF Station WKCF(TV), Cocoa, Florida. It is in Press' private interest to prevent Rainbow's WRBW(TV), a new independent UHF station, from operating in the market. In furtherance of this anticompetitive effort, Press has objected at every stage to Rainbow's efforts to move forward with construction and commencement of operation of its station. It

^{1/} While Press' pleading is not provided for under the rules, see Section 1.45(c), and should accordingly be dismissed without consideration, Rainbow has responded in an abundance of caution.

has successfully utilized and abused the Commission's processes to prevent grant of Rainbow's Form 307 extension request filed in January 1991 (File No. BMPCT-910125KE) and its *pro forma* transfer request filed in November 1991 (File No. BTCCT-911129KT). Despite the fact that Press has no legal standing to object to Rainbow's requests and despite the fact that it filed an impermissible Petition for Reconsideration of the 1991 extension, the Commission has yet to dismiss the improper request for reconsideration; has not acted on Rainbow's subsequent timely filed extension request (File No. BMPCT-910625KP), presumably because it has not yet acted on Press' improperly filed Petition for Reconsideration; and has taken no action on Rainbow's *pro forma* Form 314 transfer application permitting the formation of a limited partnership (BTCCT-911129KT), presumably because it has not yet acted on the extension requests.

Press' only interest is keeping Rainbow from going forward. It has no public interest objective and it has raised no public interest consideration. Its only and so far successful effort has been to tie Rainbow and the Commission in procedural knots so that Rainbow cannot go forward as proposed. As a result of those efforts, Rainbow remains precluded from constructing because it cannot

utilize the limited partnership funds; it cannot utilize the limited partnership funds because it cannot transfer the construction permit to the limited partnership; and it cannot transfer the permit unless it has a valid construction permit. Only the Commission can break this tangle, by prompt dismissal of Press' unauthorized Petition for Reconsideration of File No. BMPCT-910125KT; denial of its informal objections to Rainbow's pending applications in File No. 910625KP and File No. BTCCT-911129KT; and grant of those applications.

None of Press' pleadings, including the present one, which raises no argument not previously made and answered, presents any impediment to the actions Rainbow seeks. Indeed, neither Press itself nor any of its contentions is even properly before the Commission. Press is barred as a matter of law by the provisions of Rule 1.106(b) from seeking reconsideration of the Commission's denial of its informal objections to Rainbow's extension request. See *Redwood Microwave Association*, 61 F.C.C.2d 442 (1976). And Rainbow's financing is not here relevant: because it has already borne that burden in its licensing proceeding, "an applicant for a *pro forma* change of control is not required to demonstrate financial qualifications." *Canton 67, Ltd. Debtor in*

Possession, 7 FCC Rcd. 736, 738, 70 R.R.2d 788, 791 (1992).^{2/}

Moreover, even if the adequacy of Rainbow's financing proposal were here relevant, Press' filings, crafted of innuendo, speculation, assumption and surmise,^{3/} offer no basis for Commission action. "Notwithstanding the obvious distinctions between petitions to deny and informal objections (compare §§73.3584 and 73.3587 of the Commission's Rules), informal objections like petitions to deny must also contain adequate and specific factual allegations sufficient to warrant the relief requested." *Area Christian Television, Inc.*, FCC 86-298, 60 R.R.2d

2/ Press' suggestion that in seeking to change from debt to equity financing, Rainbow has put in question the legitimacy of its original financing as proposed and approved in its application, is contrary to law. The Commission finds no basis for review of financial qualifications in this kind of change because, "[a]s we have observed, projected expenditures and sources of funds relied upon by applicants in establishing their financial qualifications frequently change and are rarely carried out as planned." *Urban Telecommunications Corp.*, 7 FCC Rcd. 3867, 3870, 71 R.R.2d 12, 15 (1992).

3/ Even the speculation is often irrelevant and facially at odds with reality, as in the case of Press' allusion (at pages 2-4) to *Rey v. Guy Gannett Publishing Co., Inc.*, which Rainbow is alleged to have lost with presumptive dire effects on its basic qualifications. In fact, after denying a preliminary injunction, Judge Marcus removed the case to Florida state court where it is still in the discovery stage. That ongoing litigation can have no effect on the matters raised by Press, including specifically Rainbow's financial qualifications and the availability of its transmitter site.

862, 864. Press utterly fails to meet this threshold standard.

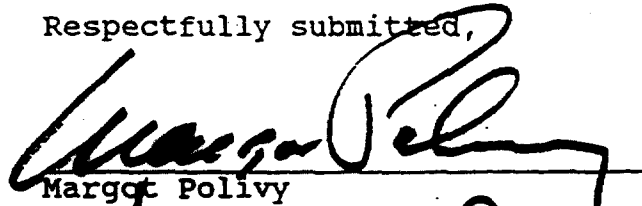
There is, in short, neither procedural nor substantive warrant for Press' attack on the bona fides of Rainbow's proposal. Rainbow is ready and willing to go forward with construction and foresees commencement of operations within six (6) months of grant of its pending requests.^{4/} See Statement of Joseph Rey attached to Rainbow's April 12, 1993 letter to Clay Pendarvis. The sole cause of delay is Press' efforts to enlist the Commission in a private commercial vendetta which should properly be resolved by head to head competition in the marketplace. The public interest favouring such competition will be thwarted unless the Commission rejects Press' delaying tactics and grants Rainbow the authorizations prerequisite to commencement of its operations.

4/ While Press contends that Rainbow should not be given time to construct because its original target date has passed, Rainbow continued ready to meet that schedule at the time it filed its transfer application. Only the agency inaction engendered by Press precluded it and the Commission recognizes that governmental delays can constitute good cause for grant of extension requests under Section 73.3534(b) of the Rules. See *Golden Eagle Communications, Inc.*, 6 FCC Rcd. 5127, 5129, 69 R.R.2d 1318, 1320-1321 (1991), *reconsideration denied*, 7 FCC Rcd. 1752 (1992).

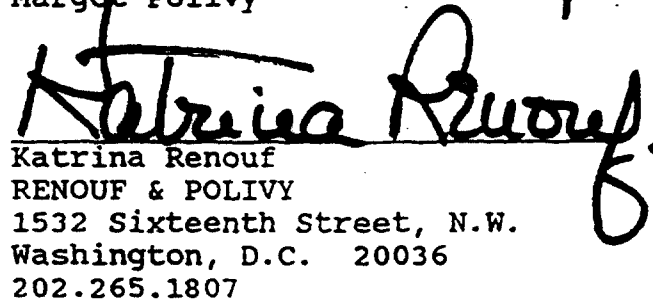
CONCLUSION

For the reasons stated above and in its several previous pleadings, Rainbow respectfully requests that the Commission reject Press' objections and grant Rainbow's pending applications for transfer and for extension of time to construct. Further, to facilitate the earliest possible institution of a new independent television service to the Orlando market, Rainbow requests that such actions be taken expeditiously.

Respectfully submitted,



Margot Polivy



Katrina Renouf
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Counsel for Rainbow
Broadcasting Company

13 May 1993

ATTACHMENT G

Appendix C hereto. While Rainbow believed its lease gave it exclusive use of the higher antenna aperture and had paid rent since 1986 to protect that higher antenna slot, Rainbow would have proceeded with construction during the tower litigation since Press would have been required to either move its antenna or protect Rainbow's operation in some other appropriate manner. The relevance of the Press/Gannett lease is that it provides Press with an incentive over and beyond the fact of its status as a competitor to impede Rainbow's efforts to get its station on the air.

The third basis for the Commission's denial of the extension request was its understanding that Rainbow relied upon the November 1991 filing of a pro forma assignment request as constituting an excuse under Rule 73.3534(b)(3) and that such an interpretation was contrary to the prior decision in *High Point Community Television, Inc.*, 2 FCC Rcd. 2506 (1987). It was not Rainbow's intention to claim that the filing of an assignment application triggered the exception reflected in Rule 73.3534(b)(3); nor is the *High Point* opinion relevant to Rainbow's situation.

Rainbow's claim to a Rule 73.3534(b)(3) exemption is that the Commission's failure to act on its pro forma

assignment request in the normal course (see footnote 4, *supra*) left the applicant unable to go forward and that such governmental inaction constituted a reason clearly beyond the applicant's control.^{8/} Neither Rule 73.3534 nor the *Report and Order*, 102 F.C.C.2d 1054 (1985) by which that rule was adopted suggests that delay by governmental inaction excludes the F.C.C.^{9/} To suggest that the Commission's failure to act in a timely manner on a timely filed request does not constitute good cause under Rule 73.3534(b)(3) is to suggest that if a permittee requested a 316 assignment within six months of its initial construction permit and the staff simply did not act on the request for two years, the construction permit could properly be cancelled for failure to construct within the

8/ At the time Rainbow filed the 316 application, it had also demonstrated initial construction (see November 27, 1991 Supplement to Form 307) and had already expended over \$200,000 in tower lease payments. There was no reason that Rainbow should have anticipated undue delay in Commission action. Moreover, the Commission has previously held that grant of even a long form transfer or assignment application is unrelated to whether the station will actually be constructed. See *Sandino Telecasters*, 8 FCC Rcd. 2573 (1993).

9/ The requirement of the *Report and Order*, 102 F.C.C.2d 1054 (1985) that transfer or assignment applications be filed within the first 12 months after issuance of a television construction permit specifically excludes short form 316 applications. *Id.*, at n.6.

ATTACHMENT H

194. Rainbow's petition explained the impact on construction efforts of the Commission's inexplicably long delay in acting on the permittee's routine and minor requests for extension and pro forma assignment and detailed the almost \$1 million in out of pocket expenses paid to that date by Rainbow's principals in station construction and preoperating expenses. Rainbow reiterated the fact that completion of construction was delayed only by Commission inaction on its still pending request to change from a general to a limited partnership and use equity rather than debt financing for its construction.^{3/}

In addition, Rainbow refuted Press' baseless speculation (repeated again in its Brief on this appeal) that Rainbow lacked the financing to proceed with construction and that its construction was prevented by denial of a preliminary injunction in a contract dispute over the exclusivity of Rainbow's antenna tower aperture. Rainbow submitted its equipment financing agreement; the federal court order removing the contract dispute to state court; and the addendum to its tower lease which required Press to remove its antenna if it interfered with Rainbow's.

3/ The Commission was informed that the limited partnership funds were in escrow and their release required only Commission approval of the assignment of construction permit to the limited partnership. At the same time Rainbow provided a detailed construction schedule.
Id.

ATTACHMENT I

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JOSEPH REY, LETICIA JARAMILLO,)	CASE NO. 90-2554-CIV-
and ESPERANZA REY-MEHR, as)	Marcus
General Partners of RAINBOW)	
BROADCASTING COMPANY, a Florida)	
Partnership,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
GUY GANNETT PUBLISHING CO.,)	
Individually, GUY GANNETT)	
PUBLISHING CO., doing business)	
as GANNETT TOWER CO., GUY)	
GANNETT PUBLISHING CO., doing)	
business as BITHLO TOWER COMPANY,)	
GANNETT TOWER COMPANY,)	
Individually, MPE TOWER, INC.,)	
Individually, and GANNETT TOWER)	
COMPANY and MPE TOWER, INC., as)	
General Partner and copartners)	
doing business as BITHLO TOWER)	
COMPANY, a Florida General)	
partnership,)	
)	
Defendants.)	

Miami, Florida
January 11, 1991
9:50 a.m.

EXCERPT
TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STANLEY MARCUS

APPEARANCES:

PLAINTIFFS:	MALCOLM H. FROMBERG, ESQ.
	ELSA ALVAREZ, ESQ.
	420 South Dixie Highway
	Third Floor
	Coral Gables, Florida 33146

1 Q You don't have your building plans for your transmitter
2 area?

3 A I have been trying to get Gannett to give me information
4 on the bidders. We had meetings, we were under way.
5 Gannett happens to have a drawing of an addition. They are
6 holding back the information required for Rainbow to have
7 continued --

8 Q You understand you can't design a transmitter room
9 without knowing what your equipment is?

10 A The transmitter room -- we had a meeting on this, Mr.
11 Hardeman. I think it was either August or September before
12 this mess started. The transmitter room that's been
13 designed is functional for Rainbow, and we were on track
14 back in August and September to start construction on that
15 building.

16 Q The only asset that Rainbow has right now is your
17 construction permit, the piece of paper?

18 A And the lease. This is an asset, too.

19 Q Now, you also do not have any written loan agreements
20 with anybody to finance your venture --

21 A Written, no.

22 Q Who is your financier? Who is loaning you the money for
23 this --

24 A Rainbow has an agreement with an investor to build and
25 operate this station. It has not been reduced to writing

1 because of this.

2 Q Is this a person you are referring to?

3 A Yes, sir.

4 Q Who is it?

5 A By the name of Howard Conant.

6 Q Is he representing a group of investigators or just
7 himself?

8 A I believe it's just himself.

9 Q So he has not affirmatively loaned you any money?

10 A Pardon?

11 Q He has not actually given you some money and taken a
12 promissory note, for example?

13 A I said it has not been reduced to writing because of
14 this. There is an agreement for the financing of the
15 station, and then this hit and everything was put on hold.
16 You asked me that in a deposition. I said that everything
17 had been put on hold because of this.

18 Q Have you advised the F.C.C. of the fact that your
19 financing has been put on hold?

20 MR. FROMBERG: Objection, Your Honor.

21 That's not a legal requirement. That's not a
22 proper question.

23 THE COURT: What relevance does it have?

24 MR. HARDEMAN: Your Honor, it goes to whether or
25 not this gentleman has met the legal requirements to

1 continue going on the air.

2 THE COURT: What obligation, though, did he have to
3 notify them of that fact?

4 MR. HARDEMAN: The evidence is going to be through
5 Mr. Hummers, that once the application for a construction
6 permit is made -- and in that application the applicant has
7 to attest to the fact that he has the financial wherewithal
8 to construct and operate his business for a period of three
9 months without any revenues, and if there is any material
10 change in that circumstance, it's my understanding that the
11 F.C.C. requires continual update of that information, a
12 reverification of that information, or (unintelligible)
13 their construction permit expires January 31st of this year,
14 I believe. They were to have filed an extension December
15 31st of 1990. I am not aware that they have done it. But
16 if they filed for the extension, they have to reassert that
17 they have the financial wherewithal to continue, which he
18 does not have (phonetic).

19 THE COURT: We will take it subject to connection
20 at a later point.

21 Q Has this gentleman told you he will no longer loan you
22 the money?

23 A It's pending, the resolution of this matter.

24 Q Has he told you that if your space is not exclusive on
25 there, that he won't finance you?

1 A He has told me if Channel 18 gets on that tower, the
2 likelihood is that he will not finance the station.

3 Q Have you talked to anybody else about loaning you money?

4 A As of late, he is the only person I was talking to.

5 I would like to clarify something for the Court, too.

6 THE COURT: All right.

7 A It is Rainbow's understanding that Rainbow has two years
8 to construct the station from September, 1990, when the
9 litigation against the F.C.C. was terminated in the Supreme
10 Court.

11 MR. HARDEMAN: Your Honor, can I have a moment,
12 please?

13 THE COURT: Yes.

14 (Pause.)

15 Q Mr. Rey, you have a copy of the final lease, do you not?

16 A Plaintiffs' Exhibit 9.

17 Q Would you look at page 20, please, an article called --
18 entitled "Interference"?

19 A Yes.

20 Q The first paragraph, "Interference," and it says: That
21 tenant understands that landlord intends to grant to other
22 tenants facilities and/or rights which are the same as or
23 similar to those granted herein to the tenant.

24 Do you understand what that meant when you signed this?

25 A That meant the lower slot, as far as I was concerned.

1 Q That's what it meant to you?

2 A Yes, sir.

3 Q It goes on to say that you are to cooperate with other
4 tenants and potential tenants so as to anticipate and
5 prevent interference.

6 A My interpretation of this paragraph was that when
7 Rainbow went out it caused interference to existing tenants
8 on that tower such as the FM stations, et cetera, then this
9 would be apropos, or if other tenants further, in the
10 future, were to come in, et cetera, but it meant lower slot
11 as far as I was concerned.

12 Q Mr. Rey, what is the name of the person who has got the
13 loan commitment for you again?

14 A Howard Conant.

15 Q How to you spell that?

16 MR. FROMBERG: Your Honor, objection.

17 It's been asked and answered.

18 MR. HARDEMAN: I am trying to do it for
19 clarification, Judge.

20 MR. FROMBERG: I think it's a concern that I have
21 in terms of the revealing of somebody else that is not -- we
22 are talking about a tower that is leasing space to a tenant.
23 This is not a T.V. station, it's not a competitor. I have
24 no problem to this person on, but I do have a problem with
25 two competitors (unintelligible) knowing about --

1 THE COURT: The objection is overruled. To the
2 extent that you are seeking that I put a confidentiality
3 order around the question and the answer concerning a
4 hearing conducted in open court as to this preliminary
5 injunction, that application is denied. I do not see a
6 sufficient basis. I understand the reason and the
7 rationale, but I am not prepared to close this Court in an
8 open hearing as to this matter.

9 MR. FROMBERG: In our view, Your Honor, we are not
10 here before the F.C.C. and arguing about rights, which they
11 can always object to if they feel it's appropriate for the
12 F.C.C. We are talking about a lease. We are talking about
13 a right to a certain area on a lease. I think that this is
14 not relevant to --

15 THE COURT: I understand. You will recall that I
16 said earlier to the extent that we had discussed this
17 matter, to the extent you wanted to explore this area when
18 an objection was made, I said that I would permit him to
19 properly explore it on cross. That application is denied.

20 You may proceed.

21 Q Mr. Rey, how do you spell Mr. Conant's name?

22 A C-o-n-a-n-t.

23 Q Is he located in Miami?

24 A No, he is not.

25 Q Where is he located?

1 A Chicago, Illinois.

2 Q How much is his loan commitment?

3 MR. FROMBERG: Objection.

4 THE COURT: Isn't this relevant as to bearing
5 specifically and directly on the claimed irreparable injury
6 and the balancing of hardships?

7 MR. HARDEMAN: It absolutely is, Judge.

8 THE COURT: I mean, your claim here is that unless
9 we go ahead and enjoin join them, basically your client is
10 out of business, he can't function, or, at least, perhaps
11 put more artfully, he isn't able to get the business off the
12 ground. And presumably that's because of the difficulty in
13 obtaining financing, and so on, and so forth.

14 It seems to me that being part of the factual
15 predicate for your claim that, A, he would sustain
16 irreparable injury, and, B, that the balance of equity is
17 the hardship tips in favor of your clients against the
18 defendant, that he ought to be permitted to explore
19 precisely that issue, and doesn't this question go to that
20 issue?

21 MR. FROMBERG: The question of irreparable harm is
22 basically handled by virtue of expert testimony as to what
23 this market will bear in terms of advertising. And upon the
24 testimony of experts, that the introduction of a competitor
25 in this T.V. market would reduce the rating to a two or

1 less, and, therefore, not attract any advertisers. That is
2 what would affect the financing --

3 THE COURT: Did I not hear you to say earlier that
4 one of the concerns that your client had was that his
5 ability to obtain financing was very much at issue here?

6 MR. FROMBERG: Yes, but it's --

7 THE COURT: Wasn't that part of it? I mean, you
8 may want to put in evidence in the form of expert testimony
9 as to that, but I am hard pressed to see if it's relevant
10 why he can't ask your client the question.

11 Overruled.

12 You may proceed.

13 Q How much of a loan commitment do you have from Mr.
14 Conant?

15 A In the neighborhood of \$4,000,000.

16 Q And this is just a handshake agreement?

17 A It's an agreement that we have that has not been reduced
18 to writing, sir. We plan to reduce it to writing and make
19 it formal in that sense.

20 Q Is there any security that you have given or collateral
21 for this loan?

22 A Yes. A minority participation on the station.

23 Q I am sorry?

24 A A minority participation in the station.

25 Q Mr. Conant is a minority member?

1 A No. By that I mean --

2 Q Or do you mean a minority shareholder?

3 A Shareholder, yes. That's what I mean.

4 Q The reason I was confused is because I understand that
5 one of the reasons that you were granted the construction
6 permit in the first instance had to do with some sort of
7 minority preference, the fact that you were --

8 A That was the issue in front of the Supreme Court.

9 Q You are using "minority" now in a different sense, that
10 he wants to be a minority shareholder of your partnership?

11 A Correct.

12 THE COURT: Any further questions on cross?

13 MR. HARDEMAN: No other questions, Your Honor.

14 Could I remind Your Honor of the time?

15 THE COURT: Yes. I understand.

16 Is there any redirect for Mr. Rey, Mr. Fromberg?

17 MR. FROMBERG: Your Honor, just a couple.

18 REDIRECT EXAMINATION

19 BY MR. FROMBERG:

20 Q Mr. Rey, do you know whether if this Court determines
21 that Rainbow has an exclusive right to the top space on the
22 tower, whether the F.C.C. will review the swap and
23 reconsider the granting of the swap?

24 A I am sorry?

25 Q If this Court determines that Press cannot be on this

1 tower in Rainbow's slot, will the F.C.C. review the swap?

2 A I believe they will.

3 Q I refer you to Exhibit -- I believe it was 6 (phonetic)
4 was introduced into evidence -- does this letter refer to
5 the -- make reference to the fact that your tower may be
6 heavier than the RCA, and that Bithlo will pick up the cost
7 of the strengthening of the tower if that's the case?

8 A Yes, it does.

9 MR. HARDEMAN: Your Honor, may I have one quick
10 question on redirect?

11 THE COURT: I am not sure Mr. Fromberg was done.

12 MR. HARDEMAN: I am sorry. I thought he said he
13 was.

14 MR. FROMBERG: I have no further questions.

15 THE COURT: All right. Any recross?

16 MR. HARDEMAN: Very briefly, Your Honor.

17 RECROSS EXAMINATION

18 BY MR. HARDEMAN:

19 Q Mr. Rey, what was the date of that financial commitment
20 from Mr. Conant?

21 MR. FROMBERG: Your Honor, this is not recross.
22 It's not in response to my one question.

23 THE COURT: I will take the answer to that
24 question.

25 A What is the date of what, sir?